

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM

1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: Nyasha Smith, Secretary of the Council
FROM: Charles Allen, Chairperson, Committee on the Judiciary and Public Safety
RE: Closing Roundtable Record
DATE: May 10, 2021

CA

Dear Ms. Smith,

Please find attached copies of the Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's April 29, 2021 Public Oversight Roundtable on "The Operations of the Department of Forensic Sciences".

The following witnesses testified at the roundtable or submitted written testimony to the Committee:

i. Public Witnesses

1. LaToya McDowney, President, Local R3-09, NAGE
2. Andre Phillips, National Representative, NAGE
3. Richard Gilbert, Representative, District of Columbia Association of Criminal Defense Lawyers
4. Frederick Hill, III, Public Witness

ii. Government Witnesses

1. Karl A. Racine, Attorney General for the District of Columbia
2. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
3. A.J. Kramer, Federal Public Defender for the District of Columbia
4. Elana Suttenger, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia
5. Chris Geldart, Acting Deputy Mayor for Public Safety and Justice
6. Daniel W. Lucas, Inspector General, Office of the Inspector General

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC OVERSIGHT ROUNDTABLE
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

ANNOUNCES A PUBLIC OVERSIGHT ROUNDTABLE ON

THE OPERATIONS OF THE DEPARTMENT OF FORENSIC SCIENCES

Thursday, April 29, 2021, 12 p.m. – 6 p.m.

Virtual Hearing via Zoom

To Watch Live:

<https://www.facebook.com/CMcharlesallen>

On Thursday, April 29, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public oversight roundtable on “The Operations of the Department of Forensic Sciences”. The roundtable will be held virtually via Zoom from 12 p.m. to no later than 6 p.m. **The roundtable is limited to invited witnesses only.**

The Department of Forensic Sciences (“DFS”) is an independent District agency whose statutory mission is to provide “high-quality, timely, accurate, and reliable forensic science services[.]” DFS’ Forensic Science Laboratory Division collects, examines, analyzes, and reports on physical evidence submitted in criminal cases, including through firearms examination.

The purpose of this public oversight roundtable is to continue the Committee’s oversight of DFS’ operations following its March 8, 2021, performance oversight hearing in light of extremely concerning subsequent developments related to firearms examination.

On March 22, 2021, the Office of the Attorney General shared the *Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences* (“Final Report”) with the DFS Stakeholder Council and other District and federal entities. The Final Report – conducted by an independent audit team of the Office of the Attorney General and the United States Attorney’s Office – raises grave concerns about DFS’ integrity and independence, including in its firearms examination casework, quality assurance processes, and management practices.

On April 2, 2021, the ANSI National Accreditation Board suspended its accreditation of the Forensic Science Laboratory Division for what it deemed credible evidence of deliberate concealment of information, violations of accreditation requirements, and misrepresentations and fraudulent behavior, as raised in the Final Report.

In light of these developments and their serious implications for the District's criminal justice system, the Committee is moving immediately to convene this public oversight roundtable.

Although the witness list for this roundtable is limited, the Committee invites the public to submit written testimony. Written statements from the public will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us.
The record will close at the end of the business day on Friday, May 7.

**Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004**

**COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY**

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AGENDA AND WITNESS LIST

- I. CALL TO ORDER**
- II. OPENING REMARKS**
- III. WITNESS TESTIMONY**

Panel 1

- 1. LaToya McDowney, President, NAGE Local R3-09
- 2. Andre Phillips, National Representative, NAGE
- 3. Richard Gilbert, Representative, District of Columbia Association of Criminal Defense Lawyers

Panel 2

- 4. Karl Racine, Attorney General for the District of Columbia
- 5. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
- 6. A.J. Kramer, Federal Public Defender for the District of Columbia
- 7. Elana Suttenger, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

Panel 3

8. Chris Geldart, Acting Deputy Mayor for Public Safety and Justice

IV. ADJOURNMENT



National Association of Government Employees
Affiliated with the Service Employees International Union
NAGE R3-09

Testimony of Latoya McDowney, President, NAGE Local R3-09
Department of Forensic Sciences

Before the
Councilmember Charles Allen, Chairperson
Committee on Public Safety

“Public Oversight Roundtable on the Operations Of
The Department of Forensic Sciences”

April 29, 2021

Good Afternoon Chairman Allen and members of the Committee on Government Operations, my name is Latoya McDowney and I serve as the Local President for the National Association of Government Employees (NAGE), Local R3-09 at the Department of Forensic Sciences. We represent various bargaining unit members, such as the employees in Crime Scene Sciences, Firearms, Latent Fingerprints, Evidence Processing, Biology, and the Public Health Lab. NAGE is proud of our members and the work that they do for the District Government and its residents. The Union believes in our members and we are here to support them!

I am here today to provide you with my testimony about concerns regarding the mismanagement, unethical behavior, and lack of transparency within the management staff for the Department of Forensics Sciences.

I began my career with the District of Columbia in 2007 and I have been employed with DFS since December 2015. Based on my union activities and personal experiences as an employee, DFS holds its employees to a higher standard than the management officials.

To start, The District Personnel Manual clearly outlines the steps to progressive discipline for our members.

However, DFS continues to circumvent the DPM and the table of penalties to wrongfully terminate members in the bargaining unit, by alleging that The United States Attorney’s Office will not provide sponsorship for them to testify in court. Without providing employees with any documentation from the USAO supporting the non-sponsorship. Nowhere in any DFS job announcement or position descriptions does it require that employees maintain a sponsorship of the USAO.

Despite a previous six figure settlements for a wrongfully termination for one of our members, DFS continues to require the USAO sponsorship and terminates employees for their failure to maintain one.

Since DFS and has been under investigation and lost its ANAB accreditation, our members have sought guidance and reported to NAGE that the DFS General Counsel, Todd Smith along with other DFS management officials advised employees to give “Push Back” if and when they were questioned by the OIG and USAO.

Todd Smith also advised members that they were not required to talk to the OIG or the USAO if they showed up at their homes. Which raises concerns and creates confusion as on one hand, DFS uses USAO Non-Sponsorship to terminate employees when it benefits them but then when OIG or the USAO is investigating DFS employees are advised not to cooperate. DFS posture completely changes with the employees when DFS is the target of the investigations.

This leads the Union to conclude that DFS is selective and only forthcoming with information that they choose to provide to the USAO.

Our members have raised concerns about the fear of losing their job due to the ANAB accreditation suspension. Due to DFSs known history of retaliating against employees for speaking up on unethical behavior our members fear reporting the misconduct, safety concerns and inadequate training within DFS.

To make matters worse, I just represented a member who was counseled and threatened a bad performance rating because she requested for her manager to clarify and expressed concerns about a new firearm procedure that clearly was outlined in the ANAB suspension as something they were advised they should cease doing.

Lastly, The Union would like for our members to be provided with clarity, and a sense of relief that they can do their job with integrity, without pressure and in an unbiased manner.

Thank you for the opportunity to testify before you today and I welcome any questions that you may have.

Latoya McDowney
NAGE Local R3-09
President



National Association of Government Employees

AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION

TESTIMONY OF ANDRE PHILLIPS, NATIONAL REPRESENTATIVE FOR THE NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

before the

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

“PUBLIC OVERSIGHT ROUNDTABLE ON THE OPERATIONS OF THE DEPARTMENT
OF FORENSIC SCIENCES”

April 29, 2021

Chairperson Allen and Members of the Committee on Government Operations, my name is Andre Phillips, I am the National Representative of the National Association of Government Employees, Mid-Atlantic Region (“NAGE” or “Union”). NAGE represents several local unions that fall under the public sector within the District Government. I am here today to testify on behalf of NAGE Local R3-09, the unionized workforce at the Department of Forensic Science (DFS) concerning “The Operations of the Department of Forensic Science”.

It is NAGE’s position that the Department of Forensic Science (DFS), under the leadership of Dr. Jennifer Smith has been poorly managed, which has created a flawed forensic servicing system. DFS is responsible for providing “high quality, timely, accurate, and reliable forensic science service”, in order to provide this service DFS, particularly the Laboratory Division **must** “collect, examine, analyze, and report on physical evidence submitted in criminal cases, including firearms examination”. In other words, the public relies on DFS to impartially weigh evidence gathered and use scientific best practices to make determinations in criminal cases. DFS findings are essential in proving criminal

liability, and if any part of their findings is based upon unreliable, unproven methods, exaggerated or misleading results it could lead to false and wrongful imprisonment adding to the current public safety crisis, which impact families (particularly in Black and Brown communities) resulting in residual trauma. The employees that perform the forensic science functions that NAGE represents at the DFS are knowledgeable and effective at their jobs, they are the subject matter experts in DNA analysis, firearms examinations, fingerprint analysis and digital evidence. On multiple occasions DFS leadership strongly encouraged employees to either revise their findings, edit their reports, and draft broad non-specific responses in its Q-CARS system. When these employees reported their concerns up the chain to management their concerns were met with opposition by DFS leadership. Those who continued to vocalize their concerns were retaliated against harassed, and oftentimes reassigned from specific cases. DFS routinely ignored its own internal policies and training manuals for the sole purpose of remaining insulated from public scrutiny. Knowing this information our members were not alarmed by the ANAB suspension.

Local R3-09 President McDowney previously testified before the council and made several pleas with city leadership to provide more oversight of the agency. She reported the hostile working environment as well as the lack of integrity within DFS. Despite her pleas DFS has been able to continue creating a culture of coercing employees, colluding to cover up incidents from the public, and intimidating and retaliating against any employee who speaks out against their unethical practices. As the city moves towards a more progressive approach in criminal justice reform and public transparency, DFS flippant disregard for integrity creates a liability blind spot for the District, thus impacting resident tax dollars.

This is an agency of public trust and their actions are counteractive to the movement throughout the nation. The integrity of the District forensic lab will forever be in question under the leadership of Director Smith as such we call on Mayor Bowser to immediately remove Director Smith, General Counsel Todd Smith, and all other senior leaders within the agency who are complicit in the wrongdoing at the agency. We also request that an independent investigation be launch by Board Ethics Government Accountability (BEGA) and based on its finding hold any bad actors accountable. Lastly, we ask that all the members of our bargaining unit be protected, assured that their jobs are secure, and free from any reprisal.

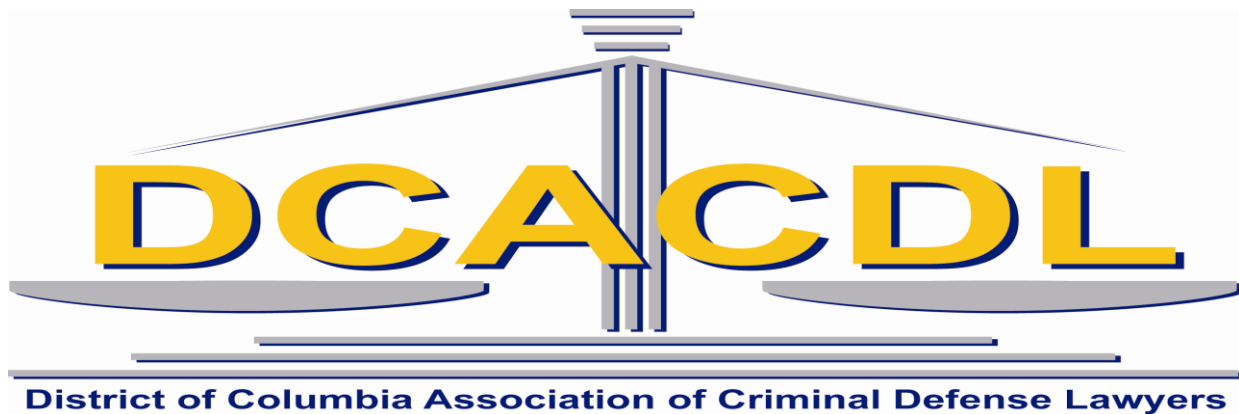
Thank you for your time and attention to the views I have raised on behalf of the NAGE.

Very Truly Yours

/s/ Andre Phillips

National Representative, NAGE

Mid-Atlantic Region



C/O JENIFER WICKS, PRESIDENT
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Honorable Charles Allen
Chair, Committee on the Judiciary and Public Safety
Council of the District of Columbia

May 7, 2021

Via email to judiciary@dccouncil.us (no paper copy mailed)

Ref. Comments Concerning DFS Problems

Dear Chairperson Allen,

I am writing in my capacity as Chair of the Legislative Committee of the District of Columbia Association of Criminal Defense Lawyers (DCACDL). As its name implies, we are a local organization of attorneys who regularly practice as criminal defense attorneys in the District of Columbia. As such we are keenly concerned with statutes, policies and personnel that impact the criminal justice system in the District of Columbia. In that connection, we are obviously concerned about problems in the District of Columbia's Department of Forensic Sciences (DFS) which has led to its accreditation being suspended and which was the subject of a Roundtable conducted by the Committee on the Judiciary and Public Safety on April 29, 2021.

We believe that any efforts by the Council to legislatively mandate changes to DFS or its policies should start with the real recognition that firearms and toolmark identification, as well as other disciplines that rely on comparison matching, is not truly a science. This has several policy implications. First, from a leadership perspective, technicians who perform the comparisons should be given the freedom to err; a conclusion which is later disputed must not be viewed as a "failure" by DFS. Second, because errors can occur, DFS practices must be instituted which make the basis of a DFS conclusion more transparent.

I. WHAT'S SCIENCE GOT TO DO WITH IT?

The scientific limits of firearms and toolmark identification were explored in a lengthy decision by Superior Court Judge Todd Edelman in *United States v. Marquette Tibbs*, 2019 WL 4359486 (D.C. Super. Ct. September 5, 2019). As Judge Edelman explained the case:

...the defense raised and extensively litigated its objection to the government's proffer of expert testimony regarding firearms and toolmark identification, a species of specialized opinion testimony that judges have routinely admitted in criminal trials. Specifically, the government sought to introduce the testimony of the firearms and toolmark examiner who used a high-powered microscope to compare a cartridge casing found on the scene of the charged homicide with casings test-fired from a firearm allegedly discarded by a fleeing suspect. According to the government's proffer, this analysis permitted the examiner to identify the recovered firearm as the source of the cartridge casing collected from the scene. The defense argued that such a conclusion does not find support in reliable principles and methods, and thus must be excluded pursuant to the standard set by the District of Columbia Court of Appeals in *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016) (en banc); by the United States Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); and by Federal Rule of Evidence 702. *Tibbs*, 2019 WL 4359486 at 1.

Judge Edelman conducted an extensive hearing “that involved detailed testimony from a number of distinguished expert witnesses, review of all of the leading studies in the discipline, pre- and post-hearing briefing, and lengthy arguments by skilled and experienced counsel,” and “ruled, on August 8, 2019, that application of the *Daubert* factors requires ***substantial restrictions*** on specialized opinion testimony in this area.” *Tibbs*, 2019 WL 4359486 at 1 (emphasis added)

Judge Edelman went on to explain:

Based largely on the inability of the published studies in the field to establish an error rate, the absence of an objective standard for identification, and the lack of acceptance of the discipline's foundational validity outside of the community of firearms and toolmark examiners, the Court ***precluded the government from eliciting testimony identifying the recovered firearm as the source of the recovered cartridge casing***. Instead, the Court ruled that the government's expert witness must limit his testimony to a conclusion that, based on his examination of the evidence and the consistency of the class characteristics and microscopic toolmarks, ***the firearm cannot be excluded as the source of the casing***. *Tibbs*, 2019 WL 4359486 at 1-2 (emphasis added)

Judge Edelman drew support from major research reports such as the Nat'l Res. Council, Nat'l Academies, Strengthening Forensic Science in the United States: A Path Forward 150-153 (2009) [hereinafter 2009 NRC Report] and President's Council of Advisors on Sci. and Tech., Executive Off. of the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 104 (2016) [hereinafter PCAST Report].

The consensus running through these sources is that the assumptions upon which firearms and toolmarks analysis rest are not actually proven by a scientific inquiry. Perhaps a simple example will suffice. Firearms manufacturers use machine tools to bore a tunnel into what will become the barrel of a firearm. The diameter of the tunnel corresponds to the caliber of the ammunition. The tool also has ridges and grooves to impart grooves on the inside of the barrel; this gives the bullet a spin which leads to greater stability and, hence, accuracy. Both the caliber and the number and direction of the grooves are intention design features, referred to as “class characteristics.” Discrepancies in the class characteristics serve to eliminate the firearm as the source of the bullet.

To make an “identification” however, all of the class characteristics must match, and the examiner must also compare microscopic markings presumably left by the machine tool on the inside of the barrel the barrel and thus transferred to the unknown bullets with similar markings on a bullet test fired from the firearm in question. The underlying assumption is that the machine tool will undergo microscopic changes as it manufactures each barrel such that the markings in the barrel are unique for every firearm made by the tool. This assumption has not been proven by scientific analysis. At the same time, a corollary assumption is that the barrel will not itself change between firing different bullets such that the markings on bullets fired from the same firearm will always be the same. Again, this has not been proven by scientific analysis, and indeed the opposite might be true – that the markings from bullets fired by the same firearm may never match completely because the firing of each bullet will alter the barrel on a microscopic level.

Lastly, the comparison of the microscopic markings on the compared bullets is ultimately a *subjective decision* by the firearms examiner; it cannot be independently verified by precision measurements. Each subjective examination introduces the possibility of error. Judge Edelman’s decision points out the difficulty of determining the error rate for this technique. For these reasons, we should not be surprised that occasionally firearms will reach different subjective conclusions as was the case in the case discussed by the Final Audit Report jointly prepared at the request of the Office of the United States Attorney and the Office of the Attorney General (the “Audit Report.”)

II. Living With Error:

The Audit Report revealed disturbing aspects to the reaction of DFS to the discrepancies in the conclusions reached in the case. There seemed to be pressure from DFS to suggest that its examiner(s) had not made an error in their examination and to change results from a definite conclusion to “inconclusive.” There were also additional examinations ordered “off the record” in the sense that they were not official and were not properly documented. These actions led to the temporary suspension of accreditation and the inability of DFS to do these examinations for the stakeholders in the District’s criminal justice system. It is a legitimate question as to whether DFS leadership properly handled the situation; nonetheless, we take no formal position on any required changes in DFS leadership practices or personnel.

We do, however, believe that everyone in the criminal justice system should recognize the limits

of firearms examinations expressed by Judge Edelman's decision. Given the thoroughness of Judge Edelman's research and analysis as well as the extensive hearing he held, his decision is likely to become the norm within the Superior Court, and "positive identifications" will be unlikely. While complete certainty, accuracy and reliability are obviously the goal, the fact is that the firearms and toolmarks discipline is currently unable to provide that. (Thus, we view with some concern the statements in the Audit Report that appear to assert unambiguously which conclusions were correct and which were erroneous.)

We do believe that several policies of the DFS should be changed, by legislation if needed. First, all analyses should be official documented. There should be informal requests for examination such that an examiner has to email her own rough notes to herself to keep a record of what was done.

Secondly, because the results of a firearms examination can have such serious consequences, the system *must be more transparent* so that a questionable conclusion can be more easily detected. The Council should consider legislation that would make the following documentation required in every firearms and toolmarks case, *in addition to* the final reports of each examiner:

1. A record of all email communications involving DFS either within DFS or with outside parties should be kept. These emails should utilize *official email channels, not personal email channels*. (Did we learn nothing from Hillary Clinton's missteps?)

2. A scrupulous chain of custody log. Policies should require that items be returned to the organization evidence custodian at the close of every day. Analysts should not be permitted to take evidence out of the lab, or to leave it unsupervised at their workplace over night.

3. All contemporaneous "rough" notes. The notes should have case, date, and time identifiers on each page – no "scratch pads."

4. Any photographs of the items examined – each clearly labelled.

5. All results of proficiency tests performed by the examiner(s) in question, and

6. Any other quality assurance materials relating to the section of DFS doing the examination.

Should the Council desire to formulate legislation to remedy problems at DFS, DCACDL is prepared to assist the Committee in that effort.

Thank for your consideration.

Sincerely,

/s/

Richard Gilbert

Chair, Legislative Committee of
The District of Columbia
Association of Criminal Defense Lawyers

If Black Lives Really Mattered

If Black Lives really mattered there would be a protest happening everyday to address the incompetency of our D.C. Forensic Science Lab. Last Thursday, April 29, 2021, Mr. Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety convened a public oversight roundtable that should have had a (Virtual) standing room only participant level.

That roundtable that should have included a “full table” of public witnesses, program managers, community organizations, law firms, solo practice attorneys, legal clinics, civil liberty unions, advocates and federal agencies, testifying and protesting at the top of their lungs.

The days following the roundtable should have led to street protests and rallies covered by media all over the world. Instead, there was **deafening silence**.

The Department of Forensic Science (DFS), is an independent District agency whose statutory mission is to provide “high-quality, timely, accurate, and reliable forensic science services. The role of the Forensic Science Laboratory Division is to collect, examine, analyze, and report on physical evidence submitted in criminal cases. This also includes firearm examination in the District of Columbia.

The independent city forensics lab, which opened in 2012 in a \$220 million facility in Southwest Washington, handles the examinations of DNA, ballistics and other evidence collected in hundreds of criminal cases. Authorities rely on the work of forensic analysts to build criminal cases, and analysts may be called on to testify in court.

On March 8, 2021 a performance oversight hearing was held in light of a multitude of disturbing and concerning developments as it relates to firearm examination.

Two weeks later on March 22, 2021, the Office of the Attorney General (OAG) shared its final report and audit of carefully selected cases of the firearm examination unit of the Forensic Science Laboratory Division inside the Department of Forensic Science with the DFS Stakeholder Council and other District and Federal entities. The report was alarming.

The Final Report was conducted by an independent audit team of the OAG and U.S. Attorney Offices (To avoid the appearance of any improprieties). The report raised concerns so grave, that the integrity and confidence in the DFS dimensioned tremendously. These developments have very serious implications for the District of Columbia’s criminal justice system.

On April 2, 2021 the ANSI, National Accreditation Board (ANAB) suspended its accreditation of the Forensic Science Laboratory due to heinous and incredible evidence of multiple violations. These violations included: concealment of information, ANSI (ANAB) accreditation mandatory requirements; behavior that was intentional and fraudulent; misrepresentation, and other behaviors deemed “criminal” if committed by an “average” citizen, in the Final Report.

The ANSI National Accreditation Board (ANAB) is a non-governmental organization that provides “accreditation” services and training to the public and private sector organizations, serving global marketplaces. ANAB is the largest accreditation body in North America and provides services in more than seventy-five countries. ANAB business depends on focusing on the customers so all front-end users will continue to value services and have confidence in the ANAB accreditation symbol.

District residents deserve and should be demanding answers to how over 220 million dollars could be spent by the DFS and have this level of incompetency.

As a result of this testimony, the DFS has come under intense scrutiny and is under continuous criminal investigation over the handling of ballistics errors in murder cases and bringing an abrupt halt to the processing of guns, DNA and fingerprint evidence amid a spike in homicides across the Nation's Capital.

Below are a few statistics:

OFFENSE	2020	2021	PERCENT CHANGE
Homicide	46	64	39%
Sex Abuse	47	45	-4%
Assault w/ a Dangerous Weapon	451	435	-4%
Robbery	523	508	-3%

Long before the lab lost its accreditation there were major concerns about DFS, Director Dr. Jenifer Smith and her leadership ability. These concerns were not hidden as alarms were raised with the Bowser Administration to no avail.

Residents of the District of Columbia should be outraged! At some point, hardened criminals convicted will now be freed due to the incompetence of DFS. They will be exonerated due to "a reasonable doubt" created by DFS negligence which also cost our residents over 220 million dollars.

The media has reported that federal authorities are continuing to investigate the conduct and oversight of a firearms analyst for the DFS an agency that has also come under scrutiny in two other instances for problems with its handling of crime scene evidence.

The investigation involves an allegation that the examiner falsely indicated that his analysis of evidence had been verified by a colleague, when it actually had not undergone a required review, according to one person familiar with the investigation. When a complaint was made, a supervisor allegedly instructed the colleague — whose name had essentially been forged — to play down his concerns.

Investment of millions of dollars in a NEW Department, programs, operations, etc. confirmed by dishonesty and just plain lying to the public is unacceptable. We need a bath in Truth!

This is an absolute fiasco! Heads need to roll!!! Many of the victims were black and their lives do matter! BLACK LIVES MATTER has a hollow ring when considered against the backdrop of such glaring INCOMPETENCE. This written testimony is submitted in response to the April 29, 2021 hearing. The record is open until May 7, 2021. Accordingly, this testimony is timely filed for the record.

Respectfully Submitted,
May 7, 2021
Frederick Hill, III
Frederick Hill, III
1425 Bangor Street SE

Washington, DC 20020
(202) 330-2211



**Statement of Karl A. Racine
Attorney General for the District of Columbia**

**Before Councilmember Charles Allen, Chairperson
Committee on the Judiciary and Public Safety**

**Public Oversight Roundtable
on
The Operations of the Department of Forensic Science**

**Thursday, April 29, 2021
12:00 p.m.**

Virtual Hearing via Zoom

Good afternoon. My name is Karl A. Racine. I am the Attorney General for the District of Columbia. Thank you, Chairman Allen and Councilmembers, for the invitation to speak with you regarding the Department of Forensic Sciences (DFS). Here with me is Elizabeth Wieser, Deputy Attorney General for Public Safety, who can assist with answering any specific questions you may have.

The recent developments regarding the handling of scientific evidence by DFS are significant and troubling. In sum, OAG received information indicating that the results of scientific testing conducted by the Firearm Examination Unit (FEU) at DFS were not reliable. We further received information that, instead of working with its law enforcement partners, including the Office of the Attorney General, to address and resolve those concerns, DFS management concealed and withheld important information about its operations, including exculpatory evidence in a homicide case. This undermined our confidence in the lab as a whole and in our ability to comply with our ethical and constitutional obligations. This was a very difficult place to arrive at, and one we tried hard to avoid. But I want to be clear about what is at stake here: the integrity of scientific evidence in the District's most serious criminal cases, faith in the validity of criminal convictions, and public safety in the District of Columbia. In my testimony today, I will walk through the information underlying these concerns and why we took the steps we did. The goal of my testimony, however, is to help chart a path forward.

First, let me explain how we got here. A little over a year ago, we learned that, in a homicide case being prosecuted by USAO, *United States v. Rondell McLeod*, DFS firearms examiners and independent examiners hired by USAO compared bullet casings from two different homicide scenes and reached conflicting results. The four DFS examiners who tested the casings determined they were fired by the same firearm. The independent examiners hired by USAO reported that the casings came from different firearms.

In February of last year, my office also received a report and letter sent to Inspector General Daniel Lucas from the USAO, which prompted an investigation by OIG, an investigation which is ongoing. The report included allegations that a firearms examiner had falsified another examiner's verification of his work, that examiners were not properly documenting their work, and that managers had downplayed and ignored this information.

As a result of the conflicting reports in the *McLeod* case and the USAO's report and referral to OIG, OAG and USAO decided to conduct an audit of DFS to determine whether we could continue to use the FEU lab, and, if we could not, to develop solutions so that we could begin using it again. We decided that, until the audit was concluded, we could not sponsor witnesses from the FEU in juvenile and adult prosecutions.

In April 2020, OAG and USAO sent a joint letter to DFS, informing Director Smith that we were retaining private firearms examiners to conduct examinations of firearms and ballistic evidence in scheduled trials. We also told DFS we would be conducting an independent audit of the FEU and invited DFS to participate in it. DFS refused. My office then retained private firearms examiners for cases set to proceed to trial while the audit was pending. This proved to be very costly. Thus far, my office has spent \$7,000 contracting independent examiners for two juvenile cases.

To conduct the audit, we hired three experts: Todd Weller, Chair of the Organization of Scientific Area Committees' Firearm and Toolmark Subcommittee; James Carroll, Assistant Director of the Los Angeles County Sheriff's Department's Crime Laboratory and certified ANAB assessor, and Dr. Bruce Budowle, Director of the Center for Human Identification and Professor and Vice Chair in the Department of Microbiology, Immunology, and Genetics at the University of North Texas Health Science Center at Fort Worth, Texas.

The outside audit, the ongoing OIG investigation, and court orders in the *McLeod* case uncovered information that is extremely concerning, to say the least. Our concerns can be divided into two buckets: the reliability of the scientific testing and OAG's ability to comply with our ethical and constitutional obligations.

First, the scientific component: The *McLeod* case involved multiple examiners who reached incorrect conclusions. By itself, that is extremely troubling. But our audit and the OIG investigation indicate the issues are much more widespread. There were an additional five cases in which independent examiners had reached conclusions that conflicted with the FEU's conclusions and, based on the information available to the auditors—remember, DFS would not let them into the lab—the outside examiners appeared to be correct. The auditors noted that the five cases suggested a pattern of interpretation that may be indicative of more serious issues with the work performed by the FEU.

Perhaps as concerning, however, the audit and investigation yielded information that DFS had conducted additional tests of the evidence in the *McLeod* case but concealed the tests and their results. In one set of tests, two DFS examiners determined the casings had not been fired by the same weapon—the same conclusion reached by the independent examiners. This information—exculpatory information in a homicide case—was not provided to USAO. USAO did not learn of this additional, secret, testing until a Superior Court judge ordered DFS to provide to USAO documents it had previously not disclosed. Perhaps most alarming, however, the documents indicated that the additional, undocumented testing was ordered by DFS management, and that DFS management made the decision to conceal the results of the exculpatory tests.

It was upon learning this information that we became concerned that, in addition to the Firearms Examination Unit, we may not be able to use any evidence or witnesses from any part of DFS. That DFS managers may have actively concealed exculpatory evidence in a homicide case, in an apparent attempt to paper over its own mistaken testing, raised alarms about the accuracy of all information coming out of the lab. This conduct, that a former DFS employee characterized as “answer shopping,” as well as the potential concealment of evidence, goes to the heart of what is wrong at the lab.

As this information was trickling into us, we were engaging with DFS and EOM in an effort to understand what was happening and to find solutions. But DFS refused to cooperate with the audit or collaborate on a path forward. Instead, it consistently downplayed the nature of the problem, characterizing the dispute as an attempt to influence the results of its testing and as a personality conflict between DFS and an Assistant United States Attorney. Leadership pointed repeatedly to its accreditation by ANAB—a national accrediting body—as evidence that there was no problem at the lab.

But OAG had no interest in undermining DFS. We were being guided by the facts we were learning. And we knew that the ANAB accreditation process would not have uncovered the type of misconduct we were seeing—it is not designed to.

On March 18, 2021, at OAG's request, our auditors issued their final report. The auditors stated that they do not have confidence in the analytical results of testing conducted by DFS's Firearms Examination Unit. The report recommended that the FEU immediately cease performing casework and that OAG not rely on results from the FEU. It also concluded that actions by DFS management had cast doubt on the reliability of the work product of the entire DFS lab. Soon after ANAB received the auditors' report, it suspended DFS's accreditation. In explaining why the accreditation was being suspended, ANAB said that it had "received credible evidence that [DFS] has deliberately concealed information from the ANAB assessment team, violated accreditation requirements, engaged in misrepresentations and fraudulent behavior, and engaged in conduct that brings ANAB into disrepute."

We cannot ignore the information discovered by OIG and our auditors, and ANAB's conclusion that it had been deceived in the accreditation process. But OAG's goal is to regain confidence in the lab and to begin using it again. We want to be supportive of a fellow DC agency. We are here to collaborate on finding a solution.

A previous, similar matter involving DFS provides a model for a path forward. In the summer of 2014, concerns had been raised about DFS's interpretation of DNA evidence in a particular case. This triggered a comprehensive review of cases in which DFS had done the same type of DNA testing. To conduct the review, USAO retained experts—including Dr. Bruce Budowle, one of the three auditors who conducted the recent audit—to conduct an independent audit. In that instance, unlike in this one, the Mayor's Office permitted the independent auditors to conduct a two-day site-visit and to interview analysts. The experts determined that the issue was systemic and made recommendations for training and process improvements. The independent audit team shared its findings with ANAB. After ANAB issued its final report in April 2015, the Forensic Biology Unit was taken off of casework for ten months to receive training, regain competency and respond to the findings in the audit report. These efforts allowed stakeholders to regain confidence in the lab, and, since then, my office has relied on the work of DFS's forensic biology unit in numerous cases.

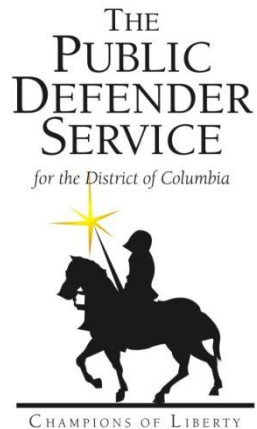
Here we are seven years later, facing another lab failure. We had hoped DFS would join us in taking a similar approach this time around, but it has refused. We hope the lab will reconsider now.

The issue is urgent and more serious than ever, as the District is in the middle of a wave of gun violence and homicides. We use the lab in some of our most serious cases—my office currently has six open juvenile homicide cases that might require forensic testing. It is costly and time consuming to use another lab for forensic testing. Not only must the District bear the cost of outsourcing forensic testing but, if expert witness testimony is required, we will incur the cost of travel and expert witness fees. Because juvenile cases must be tried within 30 to 45 days if the youth is detained, outsourcing forensic work makes trial preparation more difficult. As courts open up and more trials move forward, this will become more problematic and expensive. Perhaps most importantly, though, we simply cannot risk convicting innocent people of crimes, while the actual perpetrator walks free. And the public must have confidence in the integrity of

criminal convictions. This goes to the heart of the criminal justice system and, indeed, our democracy.

Confidence in criminal convictions raises another aspect of this problem: OAG must now conduct a robust conviction review in cases where DFS examiners conducted scientific analysis. We are taking preliminary steps to evaluate the types of cases that will require review, the time period of review, and the process to ensure that juvenile respondents and adult criminal defendants get appropriate relief.

Notwithstanding where we are today, for years, our office has had a strong relationship with DFS. We take no pleasure in being in this situation and want it resolved as soon as practicable. To that end, I propose that our audit team be allowed to enter the lab and perform the same kind of review that the 2014 independent audit team conducted. This review should be of the entire lab, not just the FEU. These experts are best positioned to conduct this kind of independent, neutral review: they are already familiar with the issues (which are complex), the structure of the lab, and the key players involved. Once the audit is completed, the auditors can provide recommendations for steps that would allow DFS to obtain accreditation and re-establish credibility with all stakeholders. We also are open to solutions others will offer. But we must solve this problem now. Thank you for holding this roundtable and giving me an opportunity to express OAG's concerns and offer a path to reestablishing confidence in the lab. As always, we are ready to help.



COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

Department of Forensic Sciences Roundtable
Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

April 29, 2021

Avis E. Buchanan, Director
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Thank you for convening this roundtable concerning the Department of Forensic Sciences and for the invitation to testify. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. Kate Philpott, forensic consultant, and Jessica Willis, Special Counsel to the Director for Forensic Science, are with me today to help answer questions.

PDS is deeply concerned that DFS's errors in analysis and failed scientific practices, and management's fear-driven work environment, lack of transparency, and its systematic efforts to cover-up employee misconduct and errors in order to protect its own reputation, have corrupted criminal trials, led to inadvisable plea agreements, and deprived District residents who were charged in the criminal legal system of a fair process. PDS does not know how many cases have been impacted by the multiple examiners we now know engaged in conduct such as answer shopping and dry-labbing,¹ or by the management culture that put career-driven self-interest

¹ Dry-labbing, or the fabrication of test results, "involves forgoing experiments and simply making up data for the sake of expediency." Rebecca Trager, *Massachusetts crime lab scandal could widen as another chemist is investigated*, Chemistry World (Jan. 14, 2021). Many of the most notorious crime lab scandals involve analysts dry-labbing to keep up the appearance of high productivity. *See, e.g., id.* Dry-labbing can come in a variety of forms. Representing that all comparisons in a case have been verified by a second examiner, when in reality only a subset have been verified (i.e. "sampling") is a form of dry-labbing. *See* DC OIG, October 29, 2019 Memorandum of Interview of Christopher Coleman, at p. 3. Reporting out conclusions about bullets and cartridge cases without placing them under a microscope is an even more extreme form of dry-labbing. At least three examples of this kind of dry-labbing at DFS have emerged over the past year and a half, involving activities that go back a decade: (1) Firearms examiner Daniel Barrett is alleged to have drawn conclusions about ballistics evidence without opening an evidence bag in 2011, *see* DC OIG, January 3, 2020 Memorandum of Activity/Interview (documentation received from Christopher Coleman); (2) Firearms examiner Kevin Webster drew conclusions about ballistics evidence without opening an evidence bag in or around 2016, *see* January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28; (3) Firearms examiner Michael Mulderig claimed to have changed an identification opinion from earlier in the day to an inconclusive based on further review of the evidence, but that re-examination did not actually take place, *see* Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences, District of Columbia, March 18, 2021 at 7-8. As Massachusetts is discovering in a scandal that is ongoing for almost a decade, where there is "a lack of real oversight, and it seems clear that if someone want[s] to engage in 'dry-labbing' at that lab no one would stop them," cases of isolated bad actors can morph into pervasive, systemic issues. Trager, *supra*. Similarly, there are allegations that DFS management knew that firearms examiners were sampling and allowed them to continue. DC OIG October 29, 2019 Memorandum of Interview of Christopher Coleman, at p. 3. Coleman believed that all of the firearms examiners who had been with the MPD were dry-labbing in some form. *Id.* at 4.

above the preservation of DFS as a credible independent agency. Given DFS management's reflexive inclination to hide scientific error and substandard practices, reports that DFS management "shaped discipline"² to avoid having to disclose witness credibility issues to the United States Attorney's Office, and employee reports that they were afraid to come forward with quality problems,³ it is likely that the uncovered information is only the tip of the iceberg and that all units within DFS are infected by practices that undermine the reliability of convictions.

It is the pervasive nature of the misconduct at DFS, rather than some good faith errors in scientific method, that led the ANSI National Accreditation Board ("ANAB")⁴ to find that DFS "deliberately concealed information from the ANAB assessment team, violated accreditation requirements, engaged in misrepresentations and fraudulent behavior, and engaged in conduct that brings ANAB into disrepute" and accordingly to suspend the accreditation for the entire forensic laboratory, not just the firearms examination unit. To PDS's knowledge, DFS is currently the only forensic laboratory in the nation that has its accreditation suspended by ANAB.⁵ Given the scope and gravity of the problems at DFS, PDS urges the Council to act broadly to protect members of the community who have been criminally accused; to reform the

Other crime labs' misfortunes tell us that dry-labbing tends not to be an isolated occurrence. It is a frame of mind: expediency above all else, including scientific integrity.

² January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 31.

³ Jack Moore, *Long before latest DC crime lab troubles, some employees raised concerns*, WTOP, April 29, 2021. Available at: <https://wtop.com/dc/2021/04/long-before-latest-dc-crime-lab-troubles-some-employees-raised-concerns/>

⁴ ANSI is an acronym for the American National Standards Institute.

⁵ See <https://search.anab.org/> which is a searchable list of laboratories' accreditation status. Based on this website, eight forensic labs have voluntarily withdrawn their accreditation. Research regarding these eight labs suggests that they largely withdrew because they were being dissolved and restructured or absorbed by another agency.

culture at the agency; and to amend DFS's authorizing statute to prevent future misconduct and ensure transparency and reliability.

The misconduct and scientific failures within DFS's Firearms Examination Unit are legion and offer an alarming illustration of systemic dysfunction at the lab. The known conduct includes examiners "sampling" evidence instead of conducting full verifications,⁶ reporting results for evidence that was not opened,⁷ reporting results for analysis but with large amounts of supporting documentation missing such that whether any actual examination was ever done is suspect,⁸ allegations of fabricating the verification and witnessing of examination⁹, and an allegation of forgery of the initials of the verifying and witnessing examiners.¹⁰ In each of these instances, DFS management encouraged a toxic culture of secrecy and opacity by covering for examiners instead of promoting a robust and proactive quality assurance response.¹¹

⁶ DC OIG October 29, 2019 Memorandum of Interview of Christopher Coleman, at p. 3. *See also supra*, note 1.

⁷ January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28.

⁸ January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28.

⁹ *See generally* January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences.

¹⁰ Whether or not verification and witnessing were fabricated, it is undisputed that the examiner forged the verifier's initials in the laboratory information management system (LIMS). January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 17.

¹¹ *See generally*, January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences. Some of the relevant findings that reveal this dysfunctional management culture outlined in the FPC Report at 30-36 are summarized by the USAO in its April 6, 2020 USAO Directive to Auditors at 1-2. ("The FPC investigation shed light on why DFS may have chosen to disclose the Barrett failed proficiency, but conceal the same conduct by Chase. DFS Quality Assurance Specialist Jessica Beyer "suggested to [FPC] that DFS management (Director Jenifer Smith, Wiggins, and Pope) made efforts to keep DFS's quality team uninformed regarding issues within the agency." Moreover, former DFS General Counsel Rashee Raj informed FPC investigators that after a crime scene technician was placed on the Lewis list for lying, Raj "felt pressure from DFS Director Smith to frame DFS disciplinary issues when conveying them to USAO so as to prevent DFS employees from ending up on the Lewis list." FPC's investigation also concluded: "Pope pre-determined the outcome of MPD's inquiry by shaping the narrative that was initially provided to [MPD] and making clear that he wanted Chase to stay at work within FEU.""). *See also infra*, footnote 12.

The cases of *United States v. Rondell McLeod* and *United States v. Joseph Brown* offer more recent and more troubling examples of the same problems. These cases have exposed false firearms identifications by at least six firearms examiners, coercion by DFS management of examiners to change the conflicting results, and a campaign by DFS managers to suppress conflicting examination results and hide them from the Science Advisory Board and the Stakeholder Council.¹² This shocking course of misconduct went unchecked because of a breakdown in a crucial component of a functional, transparent lab: the quality assurance system. Over and over again, witnesses have reported that DFS management undermined the intervention of the quality assurance teams that were responsible for identifying the root causes of both casework errors and intentional misconduct and then proposing corrective action.¹³ The lack of rigorous, proactive quality controls in place at DFS means that the Council must question the reliability of the output of the entire agency.

Although some misconduct has now come to light, the Council should not take that to mean that the existing systems and structures have consistently promoted accountability or deterred misconduct. While the Initial Review and Audit of Selected Casework of the Firearms Unit was initiated at the request of the United States Attorney's Office and the Office of the Attorney General in April 2020, there is evidence that in 2017, the USAO knew of substandard casework and possible dry-labbing by a firearms examiner named Kevin Webster but chose not to further investigate the Webster issues or make a referral to the OIG for investigation.¹⁴

¹² Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences, District of Columbia, March 18, 2021 at 4; 5; 16.

¹³ DC OIG October 23, 2019 Memorandum of Interview of Britany Graham at 3; DC OIG November 4, 2019 Memorandum of Interview of Jessica Beyer at 3-4; DC OIG January 11, 2021 Memorandum of Interview of Lyndon Watkins at 3-4.

¹⁴ Specifically, the USAO Forensic Special Counsel reported to DC OIG investigators that the USAO was aware of profound problems in DFS's firearms unit and believed that a referral to the DC OIG for investigation was necessary. However, according to this prosecutor, the information about dry-labbing and other casework

Equally troubling, the USAO did not disclose this evidence of Webster's misconduct to the defense bar, DFS's Stakeholder Council, or the Science Advisory Board.¹⁵ However, even if the prosecutors' offices made timely and complete disclosures in every instance, those processes are not substitutes for ensuring transparency and reliability at DFS. DFS, as a District agency charged with serving District residents with its nearly thirty-million-dollar budget,¹⁶ must have a robust system in place to identify and correct mistakes and to provide reliable and transparent scientific services consistent with its mission.¹⁷

The errors and misconduct committed by DFS have real world consequences for individuals charged with criminal offenses. For example, imagine a hypothetical District resident linked to a 2016 shooting homicide through ballistics evidence. That ballistics evidence was

irregularities came at a time when the USAO wanted to be seen "playing nicely" with DC agencies. For this reason, the USAO did not make the referral or formally recommend that DFS make a referral. PDS is not aware of any evidence that the USAO followed up on these substantial irregularities in any way. DC OIG December 6, 2019 Memorandum of Interview with Michael Ambrosino, Assistant United States Attorney at p. 4. ("Ambrosino recalled when the USA for D.C. changed, there was a concerted effort to mend fences with the agencies because there was a feeling that the USAO, D.C. was not playing nicely with other agencies. There was also a feeling that USAO D.C. management had DFS fatigue because they had been dealing with a number of issues related to DFS, and USAO, D.C. management felt that DFS had to manage themselves and should report the issues raised by Christophe to DCOIG. The USAO gave DFS the chance to do the right thing and report the sampling issue and dry labbing issue to DCOIG. Ambrosino has no idea if DFS reported the issues to DCOIG. Ambrosino did not have any conversation with nor was he present for any conversation with DFS management where it was relayed DFS management should report the sampling issue and dry labbing issue to DCOIG. Ambrosino told investigators he could not recall how it was communicated to DFS management that DFS management should report the issues to DCOIG, but he was sure it was communicated informally because it was still the issue of a federal agency directing a D.C. agency on how to handle an issue.").

¹⁵ See *supra*, footnote 14 detailing the USAO's knowledge of these issues in 2017. The Webster allegations were first disclosed to the defense in the January 31, 2020 Report of Referral to DC OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28.

¹⁶ See Agency approved budget for FY2020 available at: https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fr_dfs_chapter_2020j.pdf

¹⁷ D.C. Code § 5-1501.02 provides that: "The mission of the Department shall be to provide high-quality, timely, accurate, and reliable forensic science services with:

- (1) The use of best practices and best available technology;
- (2) A focus on unbiased science and transparency; and
- (3) The goal of enhancing public safety.

generated by an examiner who fabricated examination results without opening evidence, and otherwise produced substandard work.¹⁸ A robust quality assurance system would have created documentation about these examiners' unscientific practices, such as Quality Corrective Action Reports ("Q-CARs"). When the system is working correctly, DFS would produce these Q-CARs to requesting prosecutors, who then must provide that critical and potentially exculpatory information to the defense. These materials go directly to the reliability of the examiners' work, and therefore should be considered by judges assessing how much to rely on the ballistics evidence in making life-altering decisions about detention, probable cause, and the admissibility of expert testimony at trial. In this hypothetical, instead of making an informed decision, the judge relies on the ballistics evidence without any knowledge of the problems with these examiners and orders the District resident be detained at the jail to await trial. As the case proceeds, the defense lawyer never has any idea that there may be something wrong with the examiner's work because she doesn't have the scientific expertise to question the forensic results and has no reason to suspect substandard work. At trial, the defense lawyer does not know she should challenge the quality of this examiner's work, the lab's willingness to dry-lab and otherwise take shortcuts, and the individual is convicted without anyone ever questioning the ballistics. The United States Attorney's Office finds out about the examiner's flawed practices in 2017.¹⁹ This is another opportunity for the client to be informed about the issues at DFS and an opportunity for the client to raise post-conviction challenges. But neither the prosecutor nor the lab make any disclosures, so the defense remains in the dark. The January 31 2020 USAO Report

¹⁸ January 31, 2020 Report of Referral to DC-OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28.

¹⁹ January 31, 2020 Report of Referral to DC-OIG, Findings of the Fraud and Public Corruption Section's Investigation of Allegations Regarding the District of Columbia Department of Forensic Sciences, at 26-28; DC-OIG December 6, 2019 Memorandum of Interview with Michael Ambrosino, Assistant United States Attorney at p. 4.

of Referral to DC OIG finally publicly exposes the issue the examiner's practices, and four years after this District resident has been taken from his community and family, four years after he has been deprived of his liberty, he learns what should have been disclosed at his first court date.

In light of DFS's conduct and the clear harm to individuals charged in the criminal legal system, there are two immediate steps that the Council should take. First, PDS urges the Council to require DFS to disclose the names and case numbers of every individual whose case contained evidence that was analyzed, verified, or under technical review by Steven Chase, Kevin Webster, Daniel Barrett, Luciano Morales, Michael Mulderig, Alicia Vallario, Elizabeth Bustamante, Jonathan Fried, Jonathan Pope, and Ashley Rachael, for the duration of each examiner's employment at DFS. Second, the Council should require the disclosure of ALL Quality Corrective Action Reports and ALL Quality Preventative Action Reports,²⁰ along with identifying information for involved personnel, to enable those who have been accused as well as those who have been convicted to assess how their cases may have been impacted by quality assurance failures.

PDS also strongly suggests that the Council undertake reform to DFS's authorizing statute in order to create an agency that promotes scientific reliability and transparency. When the Council passed DFS's authorizing statute in 2011, it saw a "unique opportunity" with the new state-of-the-art forensic laboratory and sought to "seize upon this opportunity and lay the groundwork for a laboratory that functions independently, efficiently, and transparently from the

²⁰ Quality Preventative Action Reports (Q-PARs) are intended to describe "a situation with the potential to result in nonconformance to a policy and/or procedure and the description of the action put in place *before* a potential nonconformity occurs," in contrast to Quality Corrective Action Reports, which document nonconformities that have already occurred. DFS FSL Quality Assurance Manual, at 20. However, DFS appears to have documented some serious quality failures, such as dry-labbing, as Q-PARs. Email from Rashee Raj to Michael Ambrosino, August 15, 2017, at pp. 5-6. Further, a rule change requested by DFS requires that only Q-CARS be reported to the Science Advisory Board. See DC Municipal Regulations 28-4002, complaint process.

outset, to avoid the problems that have plagued forensic laboratories in many other jurisdictions.” The Committee believed that “the protections included in the legislation, including scientific oversight, public scrutiny, and mechanisms for the reporting and investigation of misconduct and review of potential errors also contribute to the ultimate goal of creating a District forensic laboratory that will stand as a progressive model for other jurisdictions across the country.”²¹ The Council’s goals have been thwarted by DFS practices that have minimized the reporting of information to the Science Advisory Board and to the Stakeholder Council and by a management culture that hid errors and intentional misconduct. The lessons learned from this time period should be embodied in legislation.

Reform of the Science Advisory Board is needed to strengthen oversight of DFS. PDS proposes three additions to the SAB’s current membership structure. First, the SAB membership should include a legal academic advisor to provide guidance on the vital constitutional issues regarding laboratory transparency.²² It appears that previously, this work has been performed largely by the United States Attorney’s Office, giving that stakeholder and primary customer of DFS outsized access to and influence over the lab’s practices.²³ Second, the SAB should include an expert in laboratory quality assurance systems. Third, the SAB also needs the perspective that

²¹ Bill 19-5, Department of Forensic Sciences Establishment Act of 2011, Committee Report. Available at: https://lms.dccouncil.us/downloads/LIMS/25761/Committee_Report/B19-0005-COMMITTEEREPORT.pdf

²² This advisor would serve a function akin to the role the Legal Task Group plays for the Organization for Scientific Area Committees for Forensic Science (OSAC) through the National Institute for Science and Technology. *See* OSAC, Legal Task Group, available at <https://www.nist.gov/osac/legal-task-group>. *See also* OSAC, Resource Task Groups, at <https://www.nist.gov/osac/resource-task-groups>.

²³ As DFS’s largest client, it is understandable that the two institutions routinely discuss logistics connected to the business of the lab on topics such as testing priorities. However, certain exhibits attached to DFS’s May 6, 2020 letter to then-U.S. Attorney Shea reveal an inappropriately close relationship where, for example, DFS included the USAO in internal legal deliberations, *see* Exhibit 3.7, the USAO Forensic Special Counsel actively managed DFS’s response to defense stakeholders, *see, e.g.*, Exhibits 4.1, 4.2, 4.3, and the USAO was actively involved in DFS’s response to the Daniel Barrett issue in 2017, *see, e.g.*, Exhibit 5.3.

would be provided by a human factors expert.²⁴ SAB members should have access to all internal DFS documents and should meet regularly outside of the presence of DFS management and staff. The DFS director should not lead SAB meetings or dictate the agenda of the SAB. The Council should also consider compensating the SAB, a reform enacted in other jurisdictions such as Houston which had its own pervasive lab problems.²⁵ While compensating the SAB would have budget implications, wrongful convictions also have a monetary cost for the District in civil payments²⁶ and immeasurably high cost to District residents who are wrongfully convicted. There are also the considerable costs associated with outsourcing evidence testing while DFS remains unaccredited. The Council should also consider whether a compensated and more actively involved SAB would be instrumental to regaining ANAB accreditation given ANAB's loss of confidence in DFS leadership.

DFS's quality assurance statute, D.C. Code § 5-1501.10 and related regulations,²⁷ also require reform. The quality assurance code provision gives the DFS director absolute discretion in determining whether an allegation of misconduct or other complaint is "credible and substantial" and whether it "may substantially affect the integrity of results of forensic analysis conducted by the Department." Only this finding by the DFS director triggers the requirement that the director engage an independent evaluator to conduct an investigation. In addition to

²⁴ Human factors experts have specialized knowledge in "human judgment, decision making, observer effects, communication and cognitive bias." OSAC, Human Factor Task Group, <https://www.nist.gov/osac/human-factors-task-group>. The quality assurance expert and human factors expert would serve in roles akin to the OSAC. *See id.* and OSAC, Quality Task Group, <https://www.nist.gov/osac/quality-task-group>. Given the pervasive quality issues identified to date at DFS, and the bias issues that were raised by the 2021 USAO/OAG Audit report, this expertise is essential to the Science Advisory Board.

²⁵ Houston Forensic Science Center's governing documents allow for its Technical Advisory Group to be paid "reasonable compensation." *See* Certificate of Formation, Houston Forensic Science LGC, Inc., Article VIII, available at [https://www.houstonforensicscience.org/resources/\\$1\\$Ceq3tCy9\\$yvywgjarbdoO0S.Sedtx.pdf](https://www.houstonforensicscience.org/resources/1Ceq3tCy9$yvywgjarbdoO0S.Sedtx.pdf).

²⁶ *See* DC Code § 2-423.02 regarding compensation for wrongful convictions.

²⁷ DC Municipal Regulations 28-4002, complaint process, requires DFS to provide the SAB only with complaints that result in a Q-CAR.

affording great discretion to the DFS director in evaluating any complaint of misconduct, and therefore affording the opportunity for the DFS director to minimize any such complaint, the statute mandates that the director select the independent evaluator. This structure fails to hold the DFS director accountable and allows the compounding of misconduct when the DFS director chooses to minimize it.

Transparency and accountability will also be advanced by expanding the statutory mandate for information that DFS must provide to defense counsel or make available to the public. D.C. Code § 5–1501.06, which addresses public and defense access to records, should also include defense access to all complaints, Q-CARS, and similar quality assurance flags. Recalibrating the access of defense counsel and the public will serve as a check on misconduct and an incentive for DFS management to pursue proper corrective action for errors.

The Stakeholder Council statute should also be amended to provide methods for stakeholders to raise red flags regarding DFS practices. A meaningful way of doing this would be to require quarterly meetings between the Stakeholder Council and the SAB. This would enable the SAB to raise issues directly with the Stakeholder Council and keep them informed of scientific failures at DFS.

The suspension of DFS's accreditation and the exposure of systemic problems within the agency present the Council with both an opportunity and a mandate to reform the agency. As the Council engages in reform to rebuild the agency, it is essential that the Council protect individuals who are accused in the criminal legal system because they are the most harmed by substandard scientific practices and by that lack of transparency and accountability.

**BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN**



PUBLIC OVERSIGHT ROUNDTABLE

on

The Operations of the Department of Forensic Sciences

**STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA**

Thursday, April 29, 2021, 12:00 p.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenger, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia (USAO-DC). I am accompanied today by my colleague, John Hill, Chief of the Superior Court Division, who is available to assist in answering the Committee's questions. I thank you for the opportunity to appear at today's public oversight roundtable regarding the operations of the D.C. Department of Forensic Sciences (DFS).

Forensic evidence, such as DNA and fingerprints, is the cornerstone of many felony prosecutions. We rely on forensic analyses in many of our most serious cases, including homicides, sexual assaults, shootings, and other violent crime. Forensic analysis can be critical to ascertain either the guilt or innocence of a suspect. It is our obligation as prosecutors to ensure that our investigations and prosecutions use forensic evidence and testimony that is reliable and based on sound scientific principles.

DFS has conducted most of the forensic analyses for cases that our Office prosecutes. Thus, our Office shares with the D.C. Council the common objective of enhancing public safety by having high-quality, accurate, and reliable forensic science services for cases prosecuted in the District.

The issues being examined by the Committee today came to light because, in January 2020, USAO-DC identified potential issues with DFS and raised them with appropriate stakeholders. In April 2020, our Office joined with the D.C. Office of the Attorney General (OAG-DC) to initiate an independent audit of DFS in light of three developments: first, our Office's findings in a now-closed criminal investigation of DFS's Firearms Examination Unit (FEU) that raised questions about the operations of the FEU; second, concerns with DFS's past practices with respect to providing USAO-DC with impeachment information for DFS employees; and third, casework errors made by DFS's FEU in the homicide case *United States v. Rondell McLeod*, which our Office discovered in January 2020 through an independent forensic examination. In April 2020, our Office notified DFS that we would be retaining private firearms examiners to reexamine evidence in scheduled trials to ensure the viability of our prosecutions.

It is our Office's understanding that, on December 3, 2020, the D.C. Office of the Inspector General (DC OIG) began an independent investigation of DFS related to DFS's conduct in *United States v. Rondell McLeod*. Although the USAO-DC is keeping DC OIG informed of the progress and findings of the independent auditors, the USAO-DC will not participate directly in the DC OIG administrative or criminal investigations, which are conducted independently from the USAO-DC and OAG-DC.

On March 18, 2021, the auditors issued a Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences, District of Columbia. On March 22, 2021, Acting United States Attorney Channing Phillips referred the report to DC OIG, requesting that DC OIG conduct a full investigation. OAG-DC simultaneously referred the report to the DC OIG. Our Office's understanding is that DC OIG's criminal investigation of DFS remains ongoing.

On April 2, 2021, the ANSI National Accreditation Board (ANAB) informed DFS that it was “immediately suspending the laboratory’s accreditation and initiating the process for withdrawal of accreditation.” The letter informed DFS that “ANAB has received credible evidence that the D.C. Department of Forensic Sciences, Forensic Science Laboratory Division, has deliberately concealed information from the ANAB assessment team, violated accreditation requirements, engaged in misrepresentations and fraudulent behavior, and engaged in conduct that brings ANAB into disrepute.”

To ensure the integrity of investigations and cases, we are limited in our ability to answer questions today regarding facts that could be relevant to any pending case or investigation of DFS or its employees. USAO-DC has provided and continues to provide extensive DFS-related disclosures to defense attorneys in criminal cases through the use of an online portal.

We are continuing to review the serious implications of the findings of the independent audit and the recent suspension of DFS’s accreditation, which have a significant impact on our Office’s ability to investigate and prosecute felony cases. For example, DFS has traditionally conducted a host of forensic testing and analyses: firearms and ballistics testing and analyses, including for offenses such as homicide and assault with intent to kill; DNA testing and analyses, including for offenses such as sexual assault, homicide, and firearms; drug testing and analyses; fingerprint analyses; and digital forensic analyses, such as processing electronic devices including cellphones and computers. In light of the suspension of accreditation, DFS is not performing those roles. However, DFS continues to respond to crime scenes and collect evidence on scene, such as firearms, other weapons, shell casings, and biological specimens including blood.

We support an independent, comprehensive investigation that thoroughly examines the issues identified in the audit report. All stakeholders must have confidence that those issues and any other issues that may arise have been addressed, and that procedures are put in place to ensure that similar issues do not arise in the future. We must be able to rely on accredited forensic laboratory work when investigating a crime, ascertaining whether prosecution is appropriate, and presenting evidence to courts and to juries. Addressing these issues at DFS is crucial to ensuring the integrity of our prosecutions and public safety in the District.

* * *

We appreciate the Council convening this roundtable, and we look forward to continuing to work with our partners to ensure the integrity of forensic sciences in the District.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser



Public Roundtable on

The Operations of the Department of Forensic Sciences

Testimony of
Chris Geldart

Acting Deputy Mayor for Public Safety and Justice

Before the
Committee on the Judiciary and Public Safety
Charles Allen, Chairperson
Council of the District of Columbia

April 29, 2021
12:00 PM

Good afternoon, Chairperson Allen, members, and staff of the Committee on the Judiciary and Public Safety. I am Chris Geldart, Acting Deputy Mayor for Public Safety and Justice, and I am here to discuss the Department of Forensic Sciences.

In 2011, Chairperson Phil Mendelson, when he chaired this Committee, introduced legislation establishing a forensics laboratory to analyze evidence, produce unbiased analysis, in a timely and accurate manner, using best practices and the best available technology. The lab would be guided solely by unbiased science and transparency.¹

In enacting that legislation, the Council determined it was essential that the District have a forensics laboratory, and be certified by accrediting agencies, that are independent from law enforcement and prosecutors. By doing so, the District took a progressive approach at ensuring the independence of the laboratory from the undue influence of criminal investigators or prosecutors. Indeed, the Committee report explicitly stated, “the bill transfers the functions and authority for forensic science services from the MPD to the proposed Department of Forensic Sciences to create an agency that is *separate and independent from the District’s police and prosecutors*.”²

As part of the statutorily-mandated oversight of DFS, the Council intentionally created a process for raising and addressing issues regarding the science or analysis process used by the forensics lab. The Council created a Science Advisory Board and a Stakeholder Council whose role is to address the complicated, scientific and legal matters that often accompany scientists and lawyers.

The nine-member Science Advisory Board is composed of scientists and forensic scientists, who through scientific peer review, ensure DFS is adhering to strict scientific protocols, following best practices, and incorporating new technologies. Board members are nominated by the Mayor and approved by the Council. The Board reviews all reports of negligence, misconduct, and misidentification or other testing errors within the DFS’s provision of services.

Additionally, the DFS Stakeholder Council allows our criminal justice partners and the Council to raise issues related to DFS and its work. The 10-member Stakeholder Council includes District agencies such as the Metropolitan Police Department, Department of Health, and Chief Medical Examiner, the US Attorney’s Office and Office of the Attorney General, the DC and Federal Public Defender Services, and Councilmembers. The Stakeholder Council is intended to provide all DFS customers a forum to address any concerns regarding the review and analysis done at DFS.

Finally, the Council required certification by an independent accreditation agency, which further prioritizes the pursuit of the best sciences to achieve impartial justice, not simply prosecutorial efficiency.

It is clear the Council’s intent was for the District to have an independent forensics laboratory that was guided by unbiased science. That is the policy we have followed for the past decade. It is important to note that at the time Council was considering the legislation creating an independent

¹ Department of Forensics Sciences Establishment Act of 2011, effective Aug. 17, 2011 (D.C. Law 19-18; D.C. Official Code §§ 5-1501.01 *et seq.* [emphasis added]).

² Committee on the Judiciary, Report on Bill 19-5, March 29, 2011, at 3.

forensics lab, the US Attorney's Office testified in opposition to both the agency's independence and the creation of the Science Advisory Board and Stakeholder Council.

In February 2021, when I was appointed to this position, I met with each agency in the public safety cluster and discussed frontline issues with each director. I spoke with Director Jenifer Smith about DFS's complicated working relationship with the US Attorney's Office and how DFS manages adverse positions on policy with federal prosecutors and the natural tensions that emerge from such discourse.

In some matters, some of our criminal justice partners may take issue with DFS policies impacting prosecutorial discretion, which can naturally cause strained interactions. But while there may be natural tensions with prosecutors, our goal is to abide by the District's stated policy of having a forensics lab that is independent of prosecutors and law enforcement. I understand the frustrations that federal prosecutors can have when they think DFS scientists are providing analyses that are not beneficial to their criminal cases. But that is the cost of having a truly independent forensics lab.

We are here today to discuss a way forward for the forensics lab. Since the suspension of ANAB accreditation, I have been working to listen to anyone with concerns about DFS management and processes. I have met with the US Attorney, the Attorney General, the Inspector General, ANAB, and our labor partners. My goal at each of these meetings was to listen to the concerns and discuss for possible solutions.

Part of the reason why we are here today is that some of the DFS stakeholders chose to take a route outside the process established by Council. That decision by those stakeholders raises questions as to whether the District can have a truly independent forensics laboratory.

We fully support transparency, accountability, and the need for trust in the criminal justice system. The forensics work at DFS is voluminous, challenging, and integral to the fair administration of justice. That said, we expect all DFS staff act at all times in a professional manner, both in how they do their work and in how they treat their colleagues.

In closing, the District policy for the past decade has been to have an independent lab. Our priority is the science, and using the established processes for accountability, to ensure the integrity of the science. With this as our focus, we will continue to work with all our criminal justice partners to ensure their concerns are heard and their issues are addressed.

Thank you for the opportunity to testify today. I welcome your questions.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



May 5, 2021

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W. – Suite 110
Washington, D.C. 20004

Re: Committee on the Judiciary and Public Safety Oversight Roundtable Held on
April 29, 2021

Dear Chairperson Allen:

I am providing this letter for the record to address matters discussed during last Thursday's Oversight Roundtable concerning the District's Department of Forensic Sciences (DFS); specifically, where witnesses referenced ongoing Office of the Inspector General (OIG) involvement. To date, the OIG has not shared the scope of its oversight activities as it relates to the matters presented during the Oversight Roundtable.

In order to protect the integrity of our work, the OIG does not comment on ongoing criminal investigative matters. The OIG does this to avoid the potential of: violating relevant federal and District laws and individuals' rights; placing witnesses and OIG staff in danger; prejudicing an adjudicative proceeding; or unfairly damaging the reputation of a person.

The OIG is statutorily required to report "*expeditiously* to the [United States] Attorney General whenever [we have] reasonable grounds to believe there has been a violation of Federal or District criminal law"¹ [*emphasis added*]. In past circumstances, where the OIG has sought to both investigate allegations of criminal misconduct as well as assess the effectiveness of District agency operations and make appropriate recommendations to improve effectiveness, economy, and efficiency, the OIG has prioritized its investigative work.²

¹ D.C. Code § 1-301.115a (f).

² See Press Release, U.S. Dep't of Justice, *Former District Gov't Employee Pleads Guilty to Scheme Involving Over \$1.4 Million in Fraudulently Issued Benefits* (Mar. 14, 2019), <https://www.justice.gov/usao-dc/pr/former-district-government-employee-pleads-guilty-scheme-involving-over-14-million> (last visited Apr 30, 2021); and Office of the Inspector General, *Department of Human Services: Inadequate Internal Controls Within the Economic Security Administration May Have Contributed to the Loss of \$1.8 Million* (Aug 3, 2020), <http://app.oig.dc.gov/news/view2.asp?url=release10%2FOIG+No%2E+20%2DI%2D07JA+%2D%2D+Final+Report+on+the+Evaluation+of+DHS%27+Economic+Security+Administration%2Epdf&mode=release&archive=0&month=20207&agency=0> (last Visited Apr 30, 2021).

Chairperson Allen
Re: Committee on the Judiciary and Public Safety
Oversight Roundtable Held on April 29, 2021
May 5, 2021
Page 2 of 2

My office continues to review the matters concerning the entirety of DFS' operations discussed during the Public Oversight Roundtable.

I thank you for your attention in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DWL', followed by a horizontal line extending to the right.

Daniel W. Lucas
Inspector General

DWL/mnw

cc:

The Honorable Muriel Bowser, Mayor, District of Columbia, Attention: Betsy Cavendish (via email)
The Honorable Phil Mendelson, Chairman, Council of the District of Columbia (via email)
Mr. Kevin Donahue, City Administrator, Office of the City Administrator (via email)
Mr. Eugene Adams, Director, Mayor's Office of Legal Counsel, Executive Office of the Mayor (via email)
Mr. Christopher Geldart, Acting Deputy Mayor for Public Safety and Justice (via email)
The Honorable Robert C. White, Jr., Chairperson, Committee on Government Operations and Facilities, Council of the District of Columbia (via email)
The Honorable Karl Racine, Attorney General for the District of Columbia (via email)